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Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

Geneva, 6–10 July 2015

Item 6 (b) of the provisional agenda

Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices

Feedback for improving the efficiency of the application of UNCTAD voluntary peer reviews

Note by the UNCTAD secretariat

Executive summary

During the last 10 years (2005–2015), UNCTAD has developed a unique strategy in the development of the peer reviews on competition policy. This voluntary tool allows for competition authorities in developing countries to undergo a process of self-evaluation as well as of independent evaluation, both of which enable UNCTAD to glimpse the strengths and weaknesses of their competition systems. UNCTAD facilitates the drafting of a report that is submitted for examination to the authorities of other member States that evaluate the voluntarily examined authority and propose the adoption of measures to improve and strengthen it in both institutional and normative spheres. Moreover, as an essential and specific supplement, UNCTAD provides a strategy to disseminate the results of the examination/review in the concerned country to all stakeholders in the economic system (legislative, executive, private sector and academia) and, to finalize the process, actively collaborates with the authority in order to try to change the weaknesses found in the competition regulations and improve the efficiency of the application of such laws.

This strategy of UNCTAD in carrying out reviews among peers has been evaluated positively by most member States who have been subjected to the process. However, it is necessary to create a debate to analyse and propose, based on the two external reports on the results obtained in the last 10 years, improvements in the methodology of its realization. The analysis made in these reports and the opinion that has been generated on them by various experts in the field will positively contribute to improving the utilization of this valuable instrument that UNCTAD has, in order to provide more efficient and better tailored technical assistance according to the needs of States that are interested in improving their systems of defence and promotion of competition.

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I. Introduction: UNCTAD's role in improving competition policies in developing countries

1. The competition and consumer policies programme annually services the Intergovernmental Group of Experts (IGE) on Competition Law and Policy and, when mandated, the Ad Hoc Expert Meeting on Consumer Protection; undertakes competition policy peer reviews; publishes the UNCTAD model law on competition and the handbook on competition legislation; and implements sector-specific and economy-wide competition and consumer policy reforms that create a level playing field among companies and consumers, increasing the effectiveness of antitrust and consumer protection policies. The highest intergovernmental body directly associated with this work is the United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which is held every five years.

2. The objective of UNCTAD's work on competition and consumer policies is to ensure that partner countries enjoy the benefits of increased competition, open and contestable markets and private sector investment in key sectors and, ultimately, that consumers achieve improved welfare.

3. Competition and consumer protection may play a direct and important role in promoting economic growth and reducing poverty. Competition stimulates innovation, productivity and competitiveness, contributing to an effective business environment. This generates economic growth and employment. It creates possibilities for small and medium-sized enterprises, removes barriers that protect entrenched elites and reduces opportunities for corruption. Competition therefore increases a country's attractiveness as a business location, triggering national and foreign investments. Competition also delivers benefits for consumers through lower prices, improved services and greater choice. In this sense, competition generates total consumer welfare.

4. Consumer protection benefits all consumers by ensuring that they have the right of access to non-hazardous products, to adequate information to enable them to make informed choices according to individual wishes and needs and to effective redress. Consumers who know their rights and enforce them are thus empowered and subject to fewer abuses. This directly improves their welfare. It also contributes to creating a level playing field for businesses that have to apply a common set of standards, supporting competition.

5. Despite the benefits of competition, anticompetitive practices are common, with two root causes:

- Business conduct that restrains competition. This includes agreements between businesses not to compete (which are typically illegal) through cartels, price fixing and territorial divides, for example. Businesses may also make formal, legal groupings such as marketing boards and cooperatives, which may in effect operate as cartels.
- Government policies that burden competition. Governments often have restrictive licensing regimes for certain sectors and products, such as for agricultural inputs (e.g. seeds and agrochemicals).

6. Developing economies are particularly vulnerable to anticompetitive practices: poor business infrastructure and complex regulatory and licensing regimes make it harder for companies to enter these markets; their policies, laws and regulations are often not sufficiently robust, while their enforcement agencies lack the capacity to effectively detect and address many instances of anticompetitive behaviour; and citizens and businesses are

less aware of the importance of competition and do not exercise their rights or fulfil their responsibilities.

7. Increasingly, many competition problems have a cross-border component. Companies and supply chains are international, while competition laws and enforcement agencies are primarily national. Individual countries have struggled to address anticompetitive practices at the international level, which requires regional and global collaboration to set and enforce competition rules.

8. Competition policy aims to overcome this anticompetitive environment by applying a set of market rules that guarantee a level playing field for all businesses. The successful implementation of competition policy results in the elimination of anticompetitive regulation and unnecessary barriers to competition imposed by government policies. Anticompetitive business practices are also discouraged by the effective enforcement of competition rules.

9. The perspective is split into three groupings. The first contains publications comprising specific studies and UNCTAD secretariat notes for IGEs. The second comprises sectorial index studies carried out under the COMPAL programme for Latin America (available on request) and the third outlines a number of other important publications.

II. UNCTAD voluntary peer reviews on competition policy

A. Rationale and objective

10. UNCTAD has attached a particular importance to voluntary peer reviews of competition law and policy (PRC). UNCTAD's PRCs fall within the broader framework of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the United Nations Set of Principles and Rules on Competition), adopted by the General Assembly in 1980.

11. Peer review is a time-honoured process of subjecting scholarly work to the scrutiny of others who are experts in a particular field and, in so doing, assuring that the intellectual effort meets the standards of the discipline and of science in general. The application of the peer review technique has gradually expanded from scholarly work to include public policy.

12. UNCTAD launched its voluntary peer reviews on competition law and policy (VPR) in 2005 and will celebrate their tenth anniversary in 2015. VPRs are dedicated to enhancing the quality and effectiveness of the competition policy enforcement framework in member States. They involve the scrutiny of competition policy as embodied in competition law and reflect on the effectiveness of institutions and institutional arrangements in enforcing competition law.

13. Peer reviews of competition law and policy are conducted by competition policy experts from both developing and developed countries and aim to provide technical assistance in the implementation and formulation of competition laws and policies. UNCTAD's PRCs are characterized by a focus on developing countries and examine the consequences of competition law on the economic development of such countries. Peer review reports are delivered at the annual session of the Intergovernmental Group of Experts (IGE) or at the United Nations Review Conference, held in Geneva.

B. The peers

14. Member countries volunteer for a peer review and informal commitments are agreed between UNCTAD, the competition authority and the relevant ministry.

15. UNCTAD identifies and invites peer reviewers to constitute a panel of peer reviewers. A panel usually includes three, but no more than five, members. Typical reviewers are high-level competition officials or respected academics from a member State of UNCTAD. The word peer is generally taken to denote a person who is equal in ability, standing, rank or value. Developing countries that volunteer to be reviewed have no shortage of peers among member States of UNCTAD. The participation of member States of mixed rankings brings together contemporaries who share a common interest in competition matters and offers an additional and valuable contribution to the process.

16. UNCTAD provides secretarial, technical and follow-up assistance to the recommendations of a VPR. In the first phase, UNCTAD appoints a VPR team, comprising the independent consultant and UNCTAD staff members, who have the responsibility to undertake consultations and prepare the draft review report. In the second phase, UNCTAD provides capacity-building for the follow-up process, involving the recommendations that countries choose to implement (see chapter 3).

C. Description of the voluntary peer review process

17. The peer review process is conducted in a series of steps. A VPR begins with a consultation phase that culminates in a detailed draft peer review report, which the reviewed party has the opportunity to assess for factual errors before it is finalized. The second step is the assessment phase, which is a formal interactive exchange between a panel of reviewers and the reviewed party, based on the findings of the review report. The role of the reviewers is advisory and focused on assisting the party being reviewed to address weaknesses and identify solutions for problems. During the interactive discussion, officials from the institution under review have the opportunity to clarify the findings and recommendations of the review report. In addition, other member States may pose questions and provide insight on issues arising from the review report, drawing from their own experiences in competition enforcement.

18. The post-assessment phase of a VPR is the identification of areas and issues for possible improvement. Based on these, UNCTAD prepares a capacity-building project proposal for consideration by the country and potential funding partners. The strengths of a country's competition framework contribute to the general identification and exchange of good practices among member States. The post-assessment phase is in many ways a by-product of the first two steps because the strengths and weaknesses of each regime are identified during the consultations and also during the assessment phase. The assessment phase concludes with a discussion on the way forward and the capacity-building project proposal is presented at this time.

19. Another important phase of the work by UNCTAD is related to the dissemination of the results of the peer review in the recipient country. The final evaluation report generally recommends actions affecting the structure of the authority and the content of the competition law (legal framework) or it recommends the application of existing laws by the authority. In other instances, there also exist regulations or administrative practices, which are implemented by public and private actors (ministries, public companies, industry regulators, professional associations, etc.), that actually pose problems that affect the functioning of certain markets (barriers to entry or restrictions on business).

20. Dissemination is carried out in the home country after the peer review is conducted during the IGE in Geneva. An UNCTAD high-level delegation visits the reviewed country, where high-level meetings take place with all stakeholders (ministries, authorities, businesses, chambers of commerce, universities, etc.) to explain in detail the review results and recommendations and identify how capacity-building may assist in implementation. Once a dissemination has been concluded, the UNCTAD secretariat and authority prepare a work plan to address these issues. UNCTAD tracks activities and provides support and advice to ensure that appropriate measures are taken.

21. In short, UNCTAD's VPR completes a cycle of capacity-building extended to developing countries, which starts with the formulation of a competition policy framework, drafting of a competition law, assisting in the design of an institutional framework, training of staff and case handling and a peer review after seven to 10 years. A VPR highlights the problems that have been detected in the application of competition law and policy and assists agencies to implement (with a specific technical assistance plan) the recommended measures that are agreed upon. (There will be a presentation by UNCTAD on the process that it will undertake for the peer review of Namibia and Seychelles.)

D. Completed peer reviews (2005–2014)

22. Since 2005, 18 countries have undergone review under UNCTAD's voluntary peer review mechanism. Jamaica's Fair Trading Commission and Kenya's Monopolies and Prices Commission were the first agencies to be peer reviewed in 2005. The formal assessment of both institutions took place under the auspices of the fifth United Nations Conference on Competition Policy, held in Turkey in November 2005. Experts from Germany (Bundeskartellamt), India (Competition Commission) and the United Kingdom of Great Britain and Northern Ireland (OFT) were reviewers for Jamaica and in the case of Kenya, experts from South Africa (Competition Tribunal), Switzerland (SECO) and Turkey (Competition Authority) constituted the members of the panel of reviewers.

23. Tunisia's competition institutions were peer reviewed in 2006. The formal assessment took place on 2 November 2006 during the seventh session of the Intergovernmental Group of Experts on Competition Law and Policy in Geneva. Members of the panel of reviewers were experts from Belgium (Cour de Cassation), Brazil (CADE), Kenya (Monopolies and Prices Commission), Morocco (former director of the competition authority) and Portugal (Competition Authority).

24. The West African Economic and Monetary Union (WAEMU), Benin and Senegal were reviewed in 2007. In accordance with Articles 88–90 of the 1994 Dakar Treaty, WAEMU member States are required to enforce community competition rules. The peer review of WAEMU examined the effectiveness of institutional arrangements for the enforcement of the community competition rules in relation to two member States with different levels of development that volunteered for peer review (Benin and Senegal). Benin did not have a national competition law prior to the adoption of the community competition rules and does not have an independent competition authority; a directorate in the Ministry of Industry and Trade deals with competition matters in Benin. Senegal had both a national competition law and an independent competition authority (the National Competition Commission) prior to the adoption of the community competition rules.

25. Costa Rica's voluntary peer review on competition law and policy was held during the ninth session of the IGE in 2008. Costa Rica's competition and consumer law was enacted in 1994 and at 12 years of the competition agency's operation, the law is confronted with business practices that, although having restrictive effects on competition, the law does not provide for. It also addressed institutional issues, as COPROCOM by law is dependent on the Ministry of Economy. Hence, issues of independence, investigative

tools, and law reform were addressed by peer reviewers. Costa Rica's competition commission (COPROCOM) underwent a peer review from competition authorities of Brazil (CADE), Canada (Competition Bureau), Chile (TDLC), Mexico (CFC) and the United States of America (USDoJ and USFTC). UNCTAD also looked at the way forward on how to tackle the issues that arose from the peer review report and discussion and presented a concrete proposal for further technical assistance to be undertaken in the framework of the COMPAL programme.

26. Indonesia's competition authority (KPPU) underwent a peer review at the tenth session of the Intergovernmental Group of Experts in 2009. Indonesia's competition law was enacted in 1999 and the peer review was focused on law enforcement enhancement and strategies for deeper competition advocacy.

27. In 2010, Armenia's law and competition policy was the subject of a peer review, which focused on broad economic reforms and economic development. The seminars and workshops conducted as part of the peer review sparked a lively interest on behalf of civil society organizations (CSOs), consumer groups and media associations, which put increasingly greater pressure on the competition authority to perform better and thus help to keep the process of competition policy and its effective implementation in the spotlight.

28. Serbia's peer review in 2011 addressed negotiations with the European Union for membership and accession to the WTO. A recent report from Serbia highlights that, notwithstanding the undeniable progress in the legal regulation of the activities carried out by the commission, it is still necessary that its institutional and administrative capacity be enhanced, its personnel be continuously trained to take effective action and that an emphasis should be placed institutional and human capacity-building of the agency for the purposes of carrying out credible economic analyses, in order to detect competition distortions in the market in a timely fashion.

29. In 2012, the first tripartite review (the United Republic of Tanzania, Zambia and Zimbabwe) was held, along with the VPR of Mongolia.

30. The opinions of the experts on the relevance of the tripartite nature of the review for the United Republic of Tanzania, Zimbabwe and Zambia were split. Some pointed to the fact that the competition agencies and regimes of the United Republic of Tanzania and Zambia seemed more advanced and that the three countries belonged to different trading blocs with their own competition oversight bodies. There were others, however, who thought that the above factors should not be deterrents in conducting regional reviews, since these neighbouring countries already need to cooperate in terms of competition policy, and because all three countries are members of Southern African Development Community (SADC). Members of SADC had signed a memorandum on regional cooperation in competition and consumer policies and recent developments in SADC indicated that the tripartite approach was valid.

31. For Mongolia, the eventual appointment of new board members of the competition authority during the peer review, as well as the establishment of an autonomous public procurement agency, are indicators that demonstrate that the peer review contributed to more attention being paid by the Government to improving the competition policy framework.

32. At the thirteenth session of the IGE in July 2013, three countries participated in peer reviews: Nicaragua, Pakistan and Ukraine.

33. For Nicaragua, a country dissemination workshop for recommendations from the peer review was held in October 2013. According to the competition authority, the peer review enabled it to hold discussions with members of the Parliament regarding the options

of reforming Law 601 and with judges of the Supreme Court on jurisprudence in the competition field.

34. Competition policies in Ukraine have been developing rapidly in the last several years. The competition authority, the Antimonopoly Commission of Ukraine (AMCU) was recently hailed by leading experts in competition for its bold moves. The prospective association agreement with the European Union was certainly one of the main driving forces behind this.

35. In Pakistan, there is some evidence pointing towards increased awareness of the benefits and of the role of competition policy. Improved public awareness activities, carried out by the competition authority, likely contributed to this.

36. In 2014, Namibia, Seychelles and the Philippines underwent peer reviews during the fourteenth session of the Intergovernmental Group of Experts on Competition Law and Policy.

37. UNCTAD's peer review process is considered by all the peer reviewers as a preeminent tool to enhance competition laws and policies in their countries. Due to UNCTAD's longstanding experience in working with competition authorities in developing countries and its particular development perspective, the PRCs bring an added value to the interactions between competition policies and their development dimension. The specific configuration of UNCTAD's peer review process is one of the reasons why countries are willing to voluntarily undergo reviews under the mechanism.

III. Evolution of the UNCTAD voluntary peer review methodology

38. Since 2005, UNCTAD has held, annually, one or more peer reviews for competition authorities in developing countries. Peer reviews require that a country have:

- A legal framework for competition;
- Experience of at least three to four years in its application; and
- Voluntary submission to an examination in order to be evaluated by independent experts and authorities from other countries, regions and international organizations.

39. Initially, the methodology used for evaluation of an authority was to conduct a self-assessment system and simultaneously select one or two independent experts to conduct an independent report based on the answers from questionnaires sent to authorities, analyses of the legal and institutional frameworks and interviews conducted with political, economic and social leaders in the country.

40. This approach has evolved to other forms of assessment to provide more analytical elements that help to focus on more orthodox forms of the issues detected in State policies. Thus, in 2012, for the first time UNCTAD implemented a tripartite peer review aimed at three neighbouring countries, the United Republic of Tanzania, Zimbabwe and Zambia, using a different and more complex methodology. In this peer review, the countries did not perform a self-assessment but instead conducted mutual evaluations among the three States (each authority analysed the situation of its two neighbours) and this was supplemented by reports from independent experts. The objectives of this new methodology were focused on providing greater insights in the critical systems and, in addition, on seeking synergies and solutions across systems of competition related by their geographical proximity and trade and economic relations.

41. In 2014, UNCTAD introduced a new diligence in the evaluation process of Fiji and Papua New Guinea (to be presented during the Seventh Review Conference). In this joint peer review between two neighbouring countries with a strong commercial and economic interrelationship, three analyses were performed. First, each authority conducted a self-assessment of its own system. Second, mutual evaluations were conducted. Third, two independent experts held a final evaluation for the two countries. This methodology's results were very interesting as they allowed for the development of three perspectives (reports) of the correspondent national systems and provided a clearer vision of the aspects that should be corrected and improved in the systems of competition in both countries.

42. In this perspective of continuous improvement of the procedures for peer reviews, UNCTAD aims to set mechanisms that are adaptable to the circumstances of each of the countries that voluntarily request an assessment of their national or regional systems. The goal is to know in detail the defects and elements needed to make real and substantial improvements in the regulatory frameworks and the practical implementation capacity of these countries.

IV. The recommendations of the voluntary peer reviews of competition law and policy: Comparative analysis and findings

43. In 2014, UNCTAD conducted two external evaluations. The purpose of these evaluations was to assess UNCTAD's PRC in a systematic and objective manner, in order to identify how the mechanism could be improved in terms of design, project management, implementation and effectiveness. Tracking the successful implementation of the recommendations made in the framework of the PRCs is a good indicator of the relevance of the mechanism itself.

44. Regarding the design of a PRC in itself, processed reports show that the several stages of peer review are suited and adapted to the purpose of the mechanism. The majority of countries find that the PRCs are comprehensive and cover a large part of relevant areas, namely legislation, administrative aspects related to competition law and policy, operational issues, investigative powers of competition agencies and their general decision-making procedures. Most of them consider that the PRCs overall and as a whole contribute to strengthening competition law and policy as well as the role of the competition agencies, in particular thanks to the analytical and critical method used to issue recommendations. Moreover, they acknowledge the advantage of the PRCs for taking the development aspects of competition law and policy, as well as the specificities of developing countries, into account.

45. However, some respondents mention some shortcomings of the PRCs that should be addressed by UNCTAD in order to enhance the effectiveness of the mechanism in general. For some countries, one of the weaknesses of the peer review resides in the fact that it tends to approach the competition laws and policies of reviewed countries from a technical point of view only. While technical assistance is paramount in supporting countries with the implementation of the recommendations, reviewed countries note that due to its technical perspective, a PRC has a lack of understanding of the fact that not every problem may be solved by technical assistance. This is particularly the problem when the implementation and enforcement issues and limits that a competition agency is facing stem from the institutional framework of competition law and policy and depend very much on the political will in the country. Some countries therefore indicate that UNCTAD should not only approach the implementation and follow-up of the peer review from a technical point

of view but also include more advocacy activities towards the Governments of the reviewed countries to ensure that the recommendations are backed up efficiently by political will.

46. In general, experts indicated that the peer review reports did not take into account the time needed for competition authorities and reviewed countries in general to implement the recommendations. When designing a peer review report, it should be kept in mind that changes and amendments in competition laws and policies are a time-consuming exercise and require a lot of time to be concretely put in practice. Indeed, changes in legislation and/or in the institutional and judicial systems of countries may only be materialized by going through several – often time consuming – internal processes. The peer review reports should take this feature into account when drafting recommendations in order to ensure an efficient and concrete match with the reality. Therefore, a longer-term perspective when formulating the recommendations of the peer review reports should be adopted.

A. Different types of recommendations

47. In the reports prepared for countries aimed at modifying provisions of laws, methods of acting and even political sanctions and remedies used by the competition authorities, recommendations were made. The most relevant related to the scopes cited in this subsection.

1. Recommendations related to merger reviews

48. It appears that there is often a general misconception as to what purposes and benefits merger control may achieve. Merger regulation is often seen in public opinion as preventing the growth and competitiveness of businesses. It is counter-intuitive to think that competition law is to be seen as anti-merger, as its aim is not to prevent mergers per se but rather to ensure that there remains a significant level of competition in the markets post-merger. The ambit of the proposed reforms varies from country to country. In Indonesia and Kenya, for instance, the peer review highlighted inter alia the need to raise the thresholds for notification. This avoids the misallocation of resources and enables the competition authorities to focus on the cases that would be more likely to raise competition concerns. At the time the peer review took place, Costa Rica had a non-mandatory merger notification system, which was complemented by an ex post assessment of the transaction and its effects through other competition rules. For Costa Rica, the competition authority of Costa Rica (COPROCOM) stated that this system undermined the effectiveness of its role in merger review. The recommendations and findings made in the framework of this peer review enabled it to leverage the support of the Government and other stakeholders for adopting new merger control provisions. In other cases, the country does not apply the recommendations. For instance, Jamaica did not take on board the recommendations as suggested by the peer review and presently, there is still no merger control.

2. Recommendations related to competition advocacy

49. For all the reviewed countries, recommendations on the need to enhance competition advocacy and to establish a genuine competition culture were formulated. Competition advocacy is one of the core missions of competition agencies. It is especially important for competition agencies in developing countries to communicate the benefits of competition to the public and civil society, as the purposes of competition laws and policies are not always properly understood or are not given a prominent role in policy debates. However, it is difficult for competition agencies to acquire sufficient influence and visibility to engage in competition advocacy. In general, the reviewed countries noted that the peer review had a positive and stimulating effect for the implementation of measures and initiatives related to competition advocacy. The peer review helped competition authorities to gain awareness

and recognition from the public in general but also from other particular stakeholders such as universities, media, judicial bodies and chambers of commerce.

3. Recommendations related to the investigative powers of competition agencies

50. The quality of the enforcement activities of competition authorities is contingent on the possibility for these authorities to conduct effective and efficient investigations. Legislative provisions should clearly list which investigative tools a competition authority has at its disposal to carry out its mandate. A clear statement in a legislative instrument ensures legal certainty, the principle of the protection of legitimate expectations and a good administration to economic operators. Recommendations suggesting a substantial broadening of the available investigative tools to competition authorities were made in some countries assessed in the evaluations. The scope of the proposed measures varied from country to country, as did the concrete implementation of the recommendations.

4. Recommendations related to the prioritization of cases in order to allocate resources efficiently

51. Prioritization and efficient resource allocation are of utmost importance to ensure that competition agencies can perform their functions effectively. Setting priorities is even more significant in developing countries because of the scarce resources that these competition agencies have at their disposal. Priority setting and efficient resource allocation varies from one competition agency to another, depending on the functions they have been empowered with and on the competition law mandate itself.

52. Some countries have enshrined the prioritization of cases for the competition agency in law (Indonesia), but priority setting may also be done more informally, without a legal obligation, by the competition authority (Costa Rica). In other countries, the recommendations were more targeted and related to the fact of placing too great an emphasis on the consumer protection aspects of competition law (Jamaica).

5. Recommendations related to the deterrent power of sanctions for breaches of competition law

53. In order to ensure the effective implementation and enforcement of competition law, competition authorities should have at their disposal a variety of measures sanctioning breaches of competition law and the remedies to prevent and promote respect for the law. Sanctions imposed on economic operators for infringing competition rules should be strict enough in order to ensure a genuine deterrent effect, both for the contravening economic operator and for other market players, in order to incentivize them to not engage in anticompetitive practices. However, the fact that a sanction should have a deterrent effect does not mean that no account should be taken as to its proportionality. In addition, sanctions, and pecuniary sanctions in particular, should not be excessive. Finally, it is also good to have instruments to enforce the law (leniency programmes).

54. In some countries, recommendations highlighted the need to increase the levels of fines and to adopt alternatives to financial sanctions. In all of the countries concerned by this category of recommendations, competition rules are currently being reviewed to place a greater emphasis on penalties (Costa Rica, Indonesia and Tunisia).

55. Overall, the peer review reports emphasize the importance of deterrent sanctions, but to date, none of the reviewed countries has implemented the recommendations properly. It should be noted, however, that significant efforts are being made, as all three countries are currently in the process of amending and reviewing their competition laws and policies to take the recommendations on board.

B. Follow-up activities

56. Follow-up activities include the dissemination of the results of the peer review reports, as well as capacity-building and technical assistance from UNCTAD to reviewed countries. These follow-up activities are an essential component of UNCTAD's peer reviews.

1. Dissemination of the results

57. The dissemination of the results of the peer review reports and, in particular, of the individual recommendations stemming from the reports, has also been highlighted as an important factor by all countries. Indeed, the peer review process and reports provide competition authorities and regulators with greater visibility, thus making it possible to engage in a more effective competition advocacy process.

2. Capacity-building and technical assistance

58. PRCs are a core activity of UNCTAD's work on technical assistance. To help reviewed countries to implement the various recommendations of the peer review reports, which give guidance on how the application and formulation of competition legislation may be enhanced, UNCTAD organizes capacity-building, technical assistance and training activities for the reviewed countries and their corresponding competition agencies. Thus, UNCTAD contributes to building the capacity of competition agencies in implementing their mandates and exercising their functions.

59. In general, the surveyed competition authorities agreed that the peer review processes per se had contributed and continued to contribute to building the capacity of the agencies in implementing their mandates enforcing the understanding of the strengths and weaknesses of the country's competition policy and law and their enforcement. Most countries took the view that the follow-up activities of the peer review reports, in terms of capacity-building and technical assistance, should be strengthened. For some reviewed agencies, capacity-building and technical assistance were strongly intertwined and capacity-building was seen as directly related to the technical assistance provided by UNCTAD. Others found that capacity-building differed strongly from technical assistance and took the view that capacity-building was directly linked with the peer review process as a whole, rather than flowing from technical assistance.

60. With regard to the quality of the assistance, the competition authorities indicated that one of the main reasons for approaching UNCTAD to request a peer review of their competition laws and policies was the high level of appreciation of the rigour and quality of the reviews overall, which they cited as very important for them. The peer review reports were used in amending legislation (all countries, but mostly as new drafts at the moment), advocacy (e.g. in Indonesia and Nicaragua) and establishing new training agenda for staff (in Zimbabwe), etc.

61. UNCTAD's peer review raised awareness of the need to provide other competition law and policy stakeholders – such as judicial bodies empowered with the scrutiny of breaches of competition law, private practitioners, ministries, academia and universities, journalists and the media in general – with capacity-building and training activities. The peer review reports incentivized these exercises and made training activities available to some of these stakeholders. These were organized by UNCTAD, in cooperation with national competition agencies, for both competition agency officials and other stakeholders, such as the judiciary, for instance.

62. UNCTAD organized numerous training activities for local officials and regional and subregional cooperation activities, workshops on competition law and policy for the staff of

competition agencies, including round-table discussions on these subjects. In the organization of such workshops, UNCTAD works closely with other national competition agencies and stakeholders who have more significant experience in competition laws and policies than the reviewed agencies.

63. Study tours are also an important element of capacity-building. They enable an enriching exchange of views on best practices between competition authorities and provide an opportunity for the competition agencies of developing countries to deepen their knowledge of competition law in general and of specific anticompetitive practices in particular.

64. The example of WAEMU is illustrative of the ongoing and practical follow-up activities that may be triggered by a PRC. In order to assist WAEMU to implement the recommendations suggested by the peer review report, a framework agreement was signed between WAEMU and UNCTAD in 2008. Following the agreement, high-level workshops on institutional, legislative and procedural questions and issues were organized in several member States of WAEMU. These consultations gave rise to the realization of a report entitled "Study on the revision of the institutional framework of the implementation of the WAEMU's community competition rules", which was presented to member States of WAEMU in April 2012. Consultations with member States followed the dissemination of the report and, in 2013, high-level meetings between the national experts of member States took place on the margins of UNCTAD's IGE. The efforts made by WAEMU to formally address the recommendations made in the framework of the PRC will have to be reassessed once the final consultation process on the new measures comes to an end and will be properly implemented by the relevant WAEMU community and national stakeholders.

65. Consequently, countries having undergone a PRC may be provided with technical assistance for the implementation of the recommendations stemming from the peer review report, which is especially valuable in developing countries where resources for competition law and policy tend to be rather scarce. All respondents indicated that one of the main reasons for undertaking UNCTAD's voluntary peer review was the high level of the technical assistance provided within the framework.

V. Results and new proposals

A. Results

66. The peer review reports were used in amending legislation (all countries, but mostly as new drafts at the moment), advocacy and establishing new training agenda for staff.

67. The peer review is designed to analyse in detail both the legal and institutional frameworks governing the activities of the competition authority and their effective implementation in practice. In this sense, the activity of a competition authority is divided into the following two main areas:

- Related control functions of market activities, which is aimed at traders (antitrust policy and merger control). In this area, it is important to analyse the criteria for prioritizing cases, as well as procedures on research, investigations and decisions on the handling of cases. This should allow the authority to quickly access and exchange information but must also respect and ensure the rights of the defendants.
- Activities aimed at intervening in the tasks assigned to the Government and legislative bodies in the creation of law. Indeed, the regulatory function is essential to the functioning of markets. The objectives pursued by certain regulations may be incompatible with the principle of the free market if they provide barriers to market

entry and restrictions on business activity. It is essential that regulators take into account the principle of free competition at the time of designing rules (to regulate and protect urban, safety, health, quality, etc.) and establish limitations on corporate activities only when they are necessary and proportionate to the objectives pursued.

68. The peer review process of competition laws and policies in developing countries has been hailed for its competence and delivering practical recommendations with clear road maps for the countries. The capacities of the competition authorities were built in terms of equipping them with high-quality analyses of their competition protection frameworks, as well as through follow-up assistance, wherever this was available.

69. In terms of strengthening the effectiveness of the competition authorities in implementing the improved and existing legislation, the picture is somewhat mixed. There are clear leaders, and here the UNCTAD review processes have indeed played a contributory role, but part of the countries which had improved their competition climate overall, i.e. more in terms of improvements in legal frameworks, are falling short of expectations in terms of enforcement. Some of the reasons for this include: (a) much greater needs in reforming the legislation in related areas as well as secondary legislation; (b) unfavourable policies of governments in related areas (e.g. policies related to procurement, SOEs and regulated sectors); (c) high levels of corruption; and (d) human and financial resource constraints of the competition authorities, etc.

70. The proportion of the recommendations already adopted ranges from 10 per cent (Ukraine, where the peer review session was held in July 2013) to 85 per cent (Indonesia, where a current draft law is in parliament), with an average of 40 to 50 per cent, based on the responses to the questionnaire sent out as part of the evaluation. The notion of adopted is somewhat vague and confusing, however, as many respondents further clarified that the draft amendments had yet to be adopted by the legislature. Most agencies saw it as an important task for them to achieve their final adoption by the legislature and enactment, along with greater emphasis on advocacy and implementing advocacy-related recommendations.

B. New proposals

71. The aim of the round table is to analyse and develop the peer review evaluation system that UNCTAD used in the first 10 years, in order to achieve better results in the preparation and implementation of the reviews.

72. The completion of these tests is very interesting for the authorities who wish to persevere in improving their performances. After 10 years of experience in the field of peer reviews, UNCTAD has a number of proposals to improve their methodology and application.

73. In this regard, the following proposals were received from a wide variety of competition law experts who contributed to this report:

- There is a need to change the structure of the peer review for younger agencies.
- Questions have been raised as to why some recommendations of a peer review were not implemented and, in this sense, what may be done in the future. Although this has already been covered in the 10-year report, it should be analysed in more depth.
- There is a need to find ways for other interested networks to study the results of the peer review reports. For instance, OECD accession processes could use the results of these reports.

- There is support for a combination of formal protocols and informal guidelines to prepare future reports and on how to conduct fact-finding missions. These should be available for those preparing studies in the future.
- Long-term follow up is critical. Long-term recommendations are also important and it is paramount that their implementation be monitored.
- There are questions with regard to how countries are selected for a VPR and, along the same lines, it has been proposed that a more transparent and rigorous evaluation, by UNCTAD, take place before selecting a country.
- In the context of OECD, there is a lack of formal process and the latest OECD peer reviews have not been done in the context of OECD accessions. However, between now and the UNCTAD IGE, the OECD would consider the UNCTAD recommendations and how these may impact the OECD peer reviews.
- The OECD peer review is very important for the agency on its twenty-second anniversary and it is important to carry out peer reviews for a longer period.
- It has been highlighted that institutional independency is a way to combat changes in government, which may be particularly frequent in developing countries.
- UNCTAD should continue preparing countries in OECD accessions. Structured comments would be easier than templates, but nevertheless it is tremendously important to have all of this available.
- For some, the question of selection is not an issue, but it is accepted that this may not be the case when it comes to Latin American countries.
- Nevertheless, some scepticism exists on the issue of which countries UNCTAD should assist, particularly when considering that most countries that have made market reviews should be able to be peer reviewed.
- It should be emphasized that the report highlights that the level of recommendations implemented in the reviewed countries is rather satisfying, about 50 per cent. For improvement of the outcome of the VPR processes it would be advisable to carry out an analysis of the remaining non-implemented proposals and the factors that have hindered their implementation. The process of selection of countries to be reviewed is also very important, because the main prerequisites for effective implementation of VPR recommendations are not only willingness but also (or even more) ability and readiness of the country selected to introduce any substantive reforms. Therefore, the criteria for selecting countries for evaluation by UNCTAD should be quite precisely defined, for example, they could take into account an assessment of political, legal traditions, possible financial constraints, readiness/preparedness of the competition authority, etc. This means that all the factors that contribute to or hinder the outcome of reforms/ improvements should be taken into account during the selection phase. The review process is a great opportunity for both new and old competition agencies to evaluate and improve their performances. Moreover, a VPR provides the authorities with a unique opportunity to advocate for further pro-competitive reforms towards their governments. Therefore, the authorities selected should be aware of their role in the reform process, following suit the VPR recommendations.
- Pooling efforts on recommendations and trying to identify more synergies between OECD and UNCTAD peer reviews should be recommended.

VI. Conclusions

74. The fact that a PRC is carried out on a voluntary basis is already an indication as to the relevance of the mechanism of the peer reviews.

75. UNCTAD's peer reviews on competition law and policy have been successful in many regards. Thanks to the high-quality assessments and clear-cut recommendations, the mechanism has reinforced the understanding of the strengths and weaknesses of the competition laws and policies of the reviewed countries, as well as their enforcement.

76. The design of a PRC itself, with its three major steps, including a consultation phase, an assessment phase and a post-assessment phase, was considered suitable to fulfil its objectives. However, assessing the need to change the current structure of the peer reviews, depending on the level of the competition agency, is suggested. Prior to an evaluation, a determination should be made as to whether the competition agency to be evaluated is a young agency or one with experience. It is also important to analyse and determine how agencies have evolved from the recommendations of a peer review and why some of them have not implemented the recommendations in full. In this regard, it may be assessed to strengthen practical conclusions, in order that these may be effectively applied by the agencies.

77. It should also be emphasized that perhaps not only templates but, especially, some written guidelines may be prepared for reviewers as to how to better assess information regarding people/institutions they should interview and what questions may be posed in order to reach important information, among a few others.

78. Moreover, improvements could be incorporated in the following areas:

- Coordinate with other international organizations to be able to add leverage in the pursuit of policy reforms. It will be useful to have processes to conduct VPRs that have shown to be useful in the past and to avoid duplications of work between the various international organizations.
- More focus on training and technical capacity-building is very important. The package of more in-depth technical assistance has to be provided only if there is a clear commitment by the governments to implement the recommendations, including in terms of increased funding for the agencies.
- Support mentoring partnerships between competition authorities from developing and developed countries, involving other agencies as key allies and partners in the peer review process. This could potentially create a sense of support and mentorship between agencies, which in the medium to long-term could provide additional support.
- Incorporate a stage in the peer review process whereby countries report back to the IGE in two to three years' time after an assistance package has been completed. This will have to be accompanied by an independent review of the achievements as well as a self-report by the competition authorities concerned.
- Aim to distribute the peer review reports more widely in the countries, ensuring that they reach a wider circle of journalists, civil society groups and consumer unions.
- Work together with development partners (international organizations) to ensure that the delivery of technical assistance, often funded outside the core funding for the peer review reports per se, is not delayed for too long, since this affects the expectations and perceptions of the competition agencies being assisted and may ultimately affect the effectiveness of the peer review process overall.

- It might be beneficial if the individuals involved in a VPR not only have experience with competition law but also with the country in question.

79. In short, the peer review has been an essential instrument in identifying strengths and weaknesses and evaluating the effectiveness and efficiency of national and regional systems of competition in developing countries. For UNCTAD, this instrument has established strategies more suitable in technical assistance to help the countries examined and thus more efficiently take advantage of available resources.

80. The object of the debate is, on the basis of the results obtained to date, to propose ideas to improve the methods used to date in the phase of the selection of countries (criteria) and at the stage of elaboration of a report and a review and, finally, in disseminating and monitoring for implementation the recommendations made.

81. The aim is to continue improving the effectiveness and scope of this instrument to facilitate the technical work of UNCTAD and continue in efforts to improve the quality of services to member States upon request.